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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 86

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

BRANDTJEN & KLUGE, INCORPORATED

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR PETITIONER IN REPLY TO THE BRIEF FOR RESPONDENT IN OPPOSITION

Since the filing of the petition in this case the Second Circuit has handed down its decisions in *Mitchell* v. *Hartford Steam Boiler Ins. & Ins. Co.,* (not yet officially reported, decided July 20, 1956), and in *Mitchell* v. *Feinberg,* (not yet officially reported, decided July 31, 1956), with Circuit Judge Waterman (who authored the court's opinion in *Hartford*) dissenting in *Feinberg.* (See Pet. 19–20, for references to the district court decisions in these cases).[1] These decisions concur in "the reasoning and conclusion"

[1] The opinions of the Court of Appeals are printed in Appendix A, *infra*, pp. 29–45.

of the First Circuit in the instant case.[2] While this development emphasizes the absence of a conflict among the decisions of the Courts of Appeals, the three decisions together underscore the serious far-reaching effect and immediately current importance

[2] The *Hartford* decision upholds the validity under Section 7 (e) of 600 "individual contract[s]" used in the employment of insurance inspectors working in the Hartford Company's 19 widely scattered branches throughout the country. Although the actual hours required for the job have radically differed from region to region and from inspector to inspector, the weekly guarantee is stipulated to be paid for a workweek of 60 hours indiscriminately for each of the 600 inspectors, thus purporting to cover 20 hours of overtime in each case, despite the fact that most of the inspectors rarely, if ever, have worked anywhere near 20 hours overtime, their hours of work typically fluctuating between 35 and 50 hours per week.

The *Feinberg* decision (reversing the trial court), in reliance simply on the *Hartford* decision, upholds the validity of a collective bargaining agreement with the Greater New York Tailors Expressmen's Union and the Clothing Express Drivers and Helpers Union (which covers an unknown, but obviously large, number of employees), providing a weekly guaranteed wage for a scheduled workweek of 48 hours although employees never worked as many as 48, and although the agreement on its face provided that deductions for "days absent" because of "any reason other than lack of work" should be made on the basis of a daily proportion of the weekly wage rather than on the basis of the stipulated "regular" and "overtime" rates. As pointed out in the dissenting opinion of Circuit Judge Waterman, the *Feinberg* decision is plainly contrary to this Court's decision in *Madison Ave. Corp.* v. *Asselta*, 331 U. S. 199, which "clearly proscribed such arrangements" (App. *infra*, p. 45). The dissenting opinion, however, rejected the *basis* of the trial court's decision (which was grounded on "the cumulative impact" of several factors evidencing the fictitious character of the agreement), and stated that the *sole* significant factor which distinguished the case from *Hartford* was the "days absent" provision in the agreement, frankly recognized by Judge Waterman as having "obvious benefits to employees".

of the issue and therefore confirm the need for review by this Court.

In this Reply Memorandum we shall spell out our grounds for asserting this increased need for review, and also set forth further reasons, evoked by respondent's brief in opposition and the Second Circuit's rulings, for our claim that the decision of the First Circuit below is erroneous and contrary to the mandate of Congress. It is our intention to seek review of the two Second Circuit cases, but since they are so intimately connected with consideration of the correctness and impact of the instant decision it seems appropriate to consider them here. In that way, we shall be enabled to file simpler petitions in the *Hartford* and *Feinberg* cases.

I

1. The Second Circuit decisions demonstrate beyond question that the decision below reduces the "bona fide" and "regular rate" requirements of Section 7 (e) to mere artificial and fictitious formalities, in flat contradiction to this Court's decisions prior to the 1949 Amendments (see Pet. 10–12). Respondent's objection that this view of the decision below is a "distortion" (Br. in Opp., p. 11), not only ignores the specific and unequivocal ruling in the decision itself that Section 7 (e) was "self-sufficient" and relieved the courts of the "burden" of "struggling with the implications" of the judicial decisions prior to the enactment of the 1949 Amendments (Pet. App. 30–31), but is also unmistakably refuted by the man-

ner in which the decision below was applied by the Second Circuit in the *Hartford* and *Feinberg* cases. The dissenting opinion of Judge Waterman in *Feinberg,* while emphasizing the direct conflict between the majority decision and this Court's ruling in *Madison Ave. Corp.* v. *Asselta,* 331 U. S. 199, reaffirms the artificial and formalistic criteria on which the *Hartford* decision (which Judge Waterman authored) rested. Judge Waterman there expressly states that neither *Brandtjen* nor *Hartford* attached any significance to most of the factors on which the trial court had relied—all of which were factors considered by this Court's past decisions to be evidence of an unreal and fictitious rate designed to circumvent the statutory requirements.[3]

The important question thus plainly posed by the decision below, as well as by the Second Circuit decisions, is whether the 1949 Amendments to Section 7 were intended to eliminate the preexisting standards for setting a realistic "regular rate" by agreement, or whether, as we believe, Congress was sufficiently concerned in 1949 with preserving the basic statutory overtime policy that it undertook to codify, and indeed to make somewhat more stringent, the preexisting limitations upon such agreements by providing "specific statutory guidance" to this end. That this

[3] In his dissent, Judge Waterman dismisses as of "no significance" or "of minor significance" all of the evidence which led the district court to find the agreement fictitious, with one exception. The one exception, as Judge Waterman notes, was a provision inserted in the agreement for the benefit of employees to protect them from losing the so-called "overtime" compensation when deductions for absences were made. See *supra,* p. 2, fn. 2.

issue is "an important question of federal law which has not been, but should be settled, by this Court" seems undeniable. The "regular rate of compensation," as this Court stated in its pre-1949 decisions, is the *"keystone"* of the statutory overtime policy and the "proper determination of that rate is therefore of *prime* importance" [emphasis added] (*Walling* v. *Youngerman-Reynolds Hardware Co.*, 325 U. S. 419, 424). In our view, the circuits have nullified that "keystone" by reading an erroneous purpose and intent into the 1949 Amendments. We submit that the supposed Congressional intent on which the courts rest should not be accepted without examination by this Court into the accuracy and soundness of the inferences on which the ruling below is premised (*infra,* pp. 8–13, 24–28) and without full consideration of the text and context, not alone of Section 7 (e), but of the other carefully drafted, integrated amendments to Section 7 which were enacted at the same time (*infra,* pp. 13–24).

2. Since these three decisions present the question in varied factual situations, they afford a particularly appropriate occasion for this Court to settle it. Respondent's inferences from the denial of certiorari in *Tobin* v. *Little Rock Packing Co.*, 202 F. 2d 234 (C. A. 8), certiorari denied, 346 U. S. 832 (Br. in Op., pp. 2, 10, 15), are unwarranted, not only because of the substantial differences in the facts and basic reasoning of that case, but also in view of the greatly increased importance the problem has assumed in the three years since the denial of certiorari. At that time, the courts, including the Eighth Circuit, con-

sistently agreed with the view that Section 7 (e) of the 1949 Amendments did not change the requirement that the stipulated "regular rate" in a guaranteed weekly wage contract must be an actual and not a merely fictitious rate, and no serious problem had then developed in the application of Section 7 (e). Now the decisions of the court below and of the Second Circuit have unmistakably adopted an interpretation of Section 7 (e) which discards the basic principles that might have averted the development of a problem and clearly invites an outpouring of artificial and evasive wage agreements.

And while the *Little Rock* decision, as far as could be demonstrated at that time, affected only the few office employees (about six) of the particular employer there involved, the decision below has already been followed as a precedent in two cases which, alone, directly affect hundreds, if not thousands, of employees (600 in the *Hartford* case and an unknown number covered by the general union agreement involved in the *Feinberg* case; see Pet. 19). It is also evident, even from the incomplete information now available on the use of Section 7 (e) contracts generally, that many more thousands of employees, including almost every conceivable type of worker, will be affected, if they have not already been.[4] In

[4] In addition to truck drivers in the New York City garment district and the printing press erectors and the insurance inspectors (involved in these three cases), other court decisions indicate that *Belo*-type contracts are being used for a vast range of employments, including production workers in a textile factory, bank clerks and tellers, building service and maintenance employees,

view of this already widespread use of such plans for all types and varieties of employees who have occasion to work any substantial overtime, it is no exaggera-

publishing employees of a newspaper, shipping clerks and messenger boys, guards and watchmen, a telephone operator and miscellaneous employees in a sugar mill, a cashier, laborers and "chief engineer" in an icehouse, production workers in a shirt factory, miscellaneous lumber mill employees including millwrights, sawyers, a planer operator and a bookkeeper, the employees of a cotton merchandising firm, pumpers in a petroleum company, operating engineers in a leather company, field employees in an oil well cementing business including truck drivers, mechanics, cementers and testers, a nonexecutive planer foreman in a lumber mill and general employees in a wholesale poultry and egg business. These court cases alone (even exclusive of cases involving general collective bargaining agreements like that in *Feinberg*, covering an unknown number of employees) involved at least 2,000 employees.

That the number of employees affected is in fact many thousands more, and may well run into the tens or hundreds of thousands, is indicated by an initial survey of the past year's investigative files of the Department of Labor, which, even though incomplete, already show that *Belo*-type contracts are being used to determine the wages of virtually every type of employee in a wide variety of businesses including: clerical employees of almost every sort in numerous types of businesses, creamery production workers, sausage makers, knitting mill production employees, factory workers in an auto accessory plant, machinists, delivery girls, plant employees in a soft drink factory, factory workers in a paper carton manufacturing plant, road machinery operators, janitors, butchers, cooks, bakers, firemen, cashiers, furniture craters, chauffeurs, countermen, porters, warehousemen, electricians, boiler room operators, lathe operators, timekeepers, storekeepers, scalers, linemen for a telephone exchange, elevator operators, field radio telephone operators, "key production men" in factories, the "engineers," announcers and photographers of a television broadcaster, chemists and assistant chemists, "junior accountants," inside and outside salesmen, dispatchers and loaders of a trucking line, receiving clerks, maids, lumber inspectors, material engineers, service men of a food machinery manufacturer, insurance adjusters, yarndyers and bleachers, grooms for racehorses, pattern makers, foremen in diverse businesses, and laboratory technicians.

tion to say that the construction of Section 7 (e) adopted by the decisions of the First and Second Circuits could operate virtually to nullify the fundamental overtime policy of the Act.

II

Three fundamental suppositions of the First and Second Circuits are that the 1949 Congress (1) regarded this Court's decisions on "regular rate" as of little importance except as a burdensome "morass" of "uncertainty" to be removed; (2) paid no heed to the recognized potentialities for abuse of the *Belo*-type contract; and (3) had no concern with unemployment, the economic factor which is at the base of the overtime policy of the Fair Labor Standards Act. Each of these assumptions is erroneous.

1. The position that Section 7 (e) eliminated this Court's post-*Belo* rulings is, significantly, contrary to the generally accepted understanding of the effect of Section 7 (e) immediately following its enactment. See Pet. 14–16. It is also contrary to the view taken by the lower courts in previous decisions. See Pet. 20.[5] There is likewise nothing in the legislative history to show that Congress had this purpose—a purpose which, as we shall point out more fully (*infra*, pp. 17–21, 24–28), would go far to nullify the basic objective of the Act with respect to overtime.

While Congress obviously undertook in the amendments to Section 7 to resolve many of the controver-

[5] Indeed, the court below adopted its view *sua sponte*, despite the express concession by opposing counsel in the instant case that Section 7 (e) was intended to incorporate the limitations of this Court's decisions subsequent to the *Belo* decision.

sial issues about the meaning of "regular rate," it also seems clear that Congress could not have intended to resolve uncertainty by leaving the determination of "regular rate" to virtually unrestricted agreements between employers and employees. Even the most superficial reading of subsections 7 (d) and (f)—see the discussion, *infra,* pp. 14, 21—reveals a studied effort to specify the respects in which the amendments changed this Court's decisions, and at the same time to preserve the basic concept of these decisions that the "regular rate" must be a realistic and not an artificial one.

While the conclusion that Congress intended to simplify the conditions of such agreements, so as to resolve all uncertainties and thus relieve administrative officials and courts of a burdensome task of enforcement, might appear superficially persuasive and appealing, we submit that Congress must have concluded that this easy solution was not feasible. To achieve certainty, Congress could have either flatly prohibited this type of agreement, as some of the earlier bills did, or it could have authorized agreements specifying *any* rate, without the "bona fide" and "regular rate" limitations. Instead, Congress enacted detailed, and in some instances quite complicated, standards to govern the determination of "regular rate" (see App. B., *infra,* pp. 47–49). Moreover Congress used the very terms "regular rate" and "bona fide" which this Court had employed in establishing principles for determining whether an agreement between employer and employee sets a "regular rate in a bona fide manner". See *Walling* v. *Helmer-*

ich & Payne, 323 U. S. 37, 42, and cases discussed in Pet. 10–13. These are plainly not signs of a purpose to eliminate the significant line of post-*Belo* rulings.

2. Also, the legislative history of the 1949 Amendments shows that Congress was specifically aware of, and keenly concerned about, the potentialities for abuse of the *Belo*-type agreements. Two of the earliest bills unequivocally evidenced this concern by including provisions which would have prohibited such agreements (Section 7 of H. R. 2033, H. R. 3190, and S. 653). While the subsequent bills, which permitted their use, differed in their specification of limitations, the conflicting views did not pose the alternative of *expanding* the *Belo* decision (compare *Hartford,* App. A, *infra,* p. 36). And also, contrary to the statement in *Hartford,* we have discovered no employee representatives who advocated approval, much less expansion, of the *Belo* decision. The representatives of both the A. F. L. and the C. I. O. definitely advocated prohibiting such agreements.[8] And the efforts of the employer groups urging approval of the *Belo* decision were directed simply at *preserving* its existing status rather than expanding it. As noted *supra,* p. 8, this was the generally accepted understanding by employer representatives of the effect of Section 7 (e) at the time of its enactment.

Particularly indicative of the misapprehension of legislative intent and "background," on which the

[8] Senate Hearings before a Subcommittee of the Committee on Labor and Public Welfare, United States Senate, 81st Cong., 1st sess., pp. 117, 180 and 198.

First and Second Circuits rested, is the summary manner in which both courts dismissed the Government's construction of Section 7 (e) as merely reflecting the views of an agency which "[f]rom the start * * * has disliked the *Belo* decision and has sought to whittle it down" (Pet. App. 27; see also same implied criticism in the Second Circuit *Hartford* opinion). This implication that the limitations on the application of *Belo* evolved simply from administrative dislike of the decision, rather than from legitimate reasons founded upon the terms and policies of the Act itself, reveals the courts' mistaken conception of the background against which the 1949 Amendments were enacted. For this suggestion shows that the courts disregarded the prevalent and widely shared view, repeatedly expressed by this Court no less than by the Department of Labor (and indeed specifically recognized by the First and Second Circuits in previous decisions),[7] that it was imperative to restrict the *Belo* precedent to reasonably realistic agreements, if the fundamental purposes of the overtime requirements were not to be frustrated.

It is undisputed (recognized apparently even by the decisions here in question) that the *Belo*-type contract, if given unrestricted range, can completely frustrate the basic overtime policy of the Act. The four dissenting Justices in *Belo* (Justices Reed, Black, Douglas, and Murphy) voiced this danger in no uncertain terms (316 U. S. 635–640), specifically pointing

[7] See *McComb* v. *Roig*, 181 F. 2d 726 (C. A. 1), and *149 Madison Ave. Corp.* v. *Asselta*, 156 F. 2d 139 (C. A. 2), affirmed, 331 U. S. 199.

out that the Court could not mean to be saying that "the employer and employee may *capriciously* select a certain figure, *unrelated to the wages paid,* and say 'That is the regular rate of employment,' " for that would surely serve as a precedent to allow the basic statutory overtime policy to be "frustrated" by a mere "verbal device" (*Id.* at 636, 639). [Emphasis added.]

This potential danger was soon explicitly recognized by the whole Court, which at its first opportunity, in a unanimous decision, made it unmistakably clear that *Belo* was not to be construed as approving an agreement which "made no effort to base the regular rate upon the wages actually received or upon the hours actually and regularly spent each week in working" and which computed the regular rate "in a wholly unrealistic and artificial manner so as to negate the statutory purposes" (*Walling* v. *Helmerich & Payne,* 323 U. S. 27, 41–42). And in its several subsequent decisions, the Court emphasized the importance of relating the agreed "regular rate" to "actual fact" and to "the hourly rate actually paid for the normal non-overtime workweek" if the agreement was to be at all consistent with the basic statutory overtime policy (see the decisions discussed in Pet. 10–12).

3. The fact is that unemployment was a problem in 1949, and Congress was concerned about it sufficiently to have taken care not to enact legislation which might aggravate the problem. The Bureau of Census figures show that unemployment in 1949 was substantially above the 1947 and 1948 levels. The average unemployment in 1949 was 62% higher than

the average unemployment in 1947 and 1948. In the early months of 1950 the unemployment situation became even worse, reaching a 9-year high of 4.7 million (*Annual Report on the Labor Force,* 1949 and 1950). These figures aroused widespread concern and were brought to the attention of the Congress which enacted the 1949 Amendments. On May 6, 1949, that Congress agreed to Senate Concurrent Resolution 26 which instructed a subcommittee on unemployment of the Joint Committee on the Economic Report to study "the problem of unemployment trends and their significance in current economic analyses" and "to report to Senate and House of Representatives not later than December 31, 1949, the results of its study and investigation." 95 Cong. Rec. 6774.

III

The First and Second Circuits also assume, erroneously, that Section 7 (e) is "self-sufficient" and "unambiguous", thus highlighting the fact that inadequate attention has been focused upon the text and context of the several pertinent amendments to Section 7. This serious oversight may have misled the courts into assuming that Section 7 (e) is "self-sufficient," and may well explain why, contrary to the generally accepted understanding of the effect of Section 7 (e) at the time of its enactment (see *supra,* p. 8), these courts were diverted into relying primarily, if not exclusively, upon suppositions drawn from a superficial view of the legislative "background." The courts apparently failed to note that this subsection is only one of several interlocking

amendments to Section 7. [The other pertinent amendments to Section 7 are printed in Appendix B, *infra*, p. 46.]

1. Directly pertinent, by its very terms, is the new Section 7 (d), which the Conference Report on the Amendments described as "containing a comprehensive statutory definition of 'regular rate'" (95 Cong. Rec. 14930). This amendment provides that "*As used in this section* the 'regular rate' at which an employee is employed shall be deemed to include *all remuneration* for employment paid to, or on behalf of, the employee" except for certain specifically listed and carefully described payments. [Emphasis added.] That this definition was intended to control the meaning of "regular rate" as used anywhere in Section 7 is confirmed by the fact that references to *sub*sections are expressly so designated (see, for example, the reference to "subsection (a)" in 7 (e) and (f) and the reference to "subsection (d)" in 7 (f) and (g)).

We fully agree, of course, with respondent's contention that its wage plan should "be measured against the statute to determine its validity" (Br. in Opp., p. 11). But although respondent concedes (Br. in Opp., p. 9) that the "regular rate" requirement of Section 7 (e) is understood to refer to the term defined in Section 7 (d), the court below did not measure the "basic rate of pay" specified in respondent's agreements against the provisions of Section 7 (d). Instead, it proceeded on the premise that the terms of Section 7 (e) were "unambiguous" and "self-suffi-

cient," without reference either to prior judicial decisions or to other provisions of the amended Act.

While the opinion below refers to the amendments contained in paragraphs (5), (6) and (7) of Section 7 (d) (to note that these paragraphs overturned this Court's decision in *Bay Ridge Operating Co., Inc.* v. *Aaron*), it does not mention the other paragraphs of Section 7 (d) relating to the computation of "regular rate." Reference to the "specific statutory guidance" provided in these other paragraphs would have shown that Congress there codified, rather than overruled, the realistic limitations imposed by this Court's other decisions upon agreements fixing the "regular rate" on which overtime compensation depends.

The payments which Section 7 (d) permits to be excluded from the computation of "regular rate" are listed in seven numbered paragraphs. As just noted, the court below did not refer to paragraph (2) which is directly pertinent to the issue in this case. That paragraph provides that "regular rate" shall not be deemed to include "payments made for *occasional periods when no work is performed* due to vacation, holiday, illness, *failure of the employer to provide sufficient work,* or other similar cause." [Emphasis added.] The plain implication of this exclusion is that payment made *regularly* rather than occasionally for "periods when no work is performed" due to "failure of the employer to provide sufficient work" *must be included* in the "regular rate."[8]

[8] The intent to preserve a realistic "regular rate" is evident in virtually every provision of Section 7 relating to computation of

Since the definition of "regular rate" in Section 7 (d) controls the meaning of "regular rate" in Section 7 (e), the stipulated contractual "regular rate" *must* include payments made for such nonworking periods unless they are only "occasional." In the instant case, such periods plainly were regular and frequent, not merely "occasional." Some of the individual employees, under the contract terms, received payments invariably for many unworked hours every week over a period of two or three years (R. 15).[9] One employee who never worked over 41½ hours a week except for one week a year, over a three year period, regularly received payments supposedly for 6½ or more unworked hours.[10] The group as a whole

overtime compensation. Each of the exclusions from "regular rate" provided in Section 7 (d) relates to meticulously specified payments of an occasional or special nature, and in most instances is expressly limited to "occasional" or "special" types of payments not "dependent on" or "not made as compensation for" the employee's "normal" or "regular" working hours or for the "production or efficiency" required by his normal employment. See, in particular, Sections 7 (d) (1), (2), (3), (5) and (6). The same intent is evident in the requirements of Section 7 (f) that overtime compensation be made on the basis of "bona fide rates applicable to the same work when performed during non-overtime hours" (Paragraphs (1) and (2)) or on the basis of a "basic rate * * * substantially equivalent to the average hourly earnings of the employee, exclusive of overtime premiums" (Paragraph (3)).

[9] See wage transcription sheets for employees Carter and Nowicki (R. 17–18, 45–50). See also sheets for employee Prudhomme who never worked as much as 48 hours (not as much as 45 hours) a week for a period of over 2½ years, and thereafter in only 2 weeks of the entire 3 year period (R. 25–30).

[10] See wage transcription sheet for employee Cassaady (R. 39–44).

received such payments in over 95 percent of the workweeks during the three-year period (see Pet. 6).

The reasons why the statute requires such payments to be included in the computation of the "regular rate" seem plain. They are the same reasons which led this Court to hold that a realistic regular rate cannot "be fixed by contract at a point completely unrelated to the payments actually and normally received each week by the employees" (*Youngerman-Reynolds,* 325 U. S. at 426), and that if "the contract regular rate did not represent the rate which was actually paid for ordinary, non-overtime hours," and did not "allow extra compensation to be paid for true overtime hours," then the rate is "fictitious" and "illusory" (*Helmerich & Payne,* 323 U. S. at 41–42). "The Act clearly contemplates the setting of the regular rate in a bona fide manner" and "freedom of contract does not include the right to compute the regular rate in a wholly unrealistic and artificial manner so as to negate the statutory purposes" (*Id.* at 42). A contract rate which is "not in fact the regular rate under any normal circumstances" is "obviously an artificial one, however bona fide it may have been in origin" and would enable the employer "by a mere label * * * to nullify all the purposes for which Section 7 (a) was created" (*Youngerman-Reynolds,* 325 U. S. at 425–426). It is, therefore, necessary to "look beyond that which the parties have purported to do," and to view "the operation of the plan in actual practice," and, specifically, to recognize that "payment of 'overtime' compensation for non-

overtime work raises strong doubt as to the integrity of the hourly rate upon the basis of which the 'overtime' compensation is calculated" (*Madison Avenue Corp.* v. *Asselta,* 331 U. S. at 204, 205, 209).

Section 7 (d) (2), in effect, incorporates the principles of these decisions. By requiring inclusion in the "regular rate" of "all remuneration" paid "for employment", except for the specific exclusions, and restricting the pertinent exclusion to payments "for occasional periods when no work is performed," it recognizes the simple practical fact that an employer who purports to make payments *regularly* for periods in which no work is performed is, in reality, making those payments as "remuneration" for the employees' actual working hours, and that the employees' remuneration is actually at a regular rate somewhat higher than the employer claims it to be. In other words, "these employees do in fact regularly receive the higher rate" and "[t]o compute overtime compensation from the lower and unreceived rate is not only unrealistic but is destructive of the legislative intent," making the basic statutory overtime policy "impossible of achievement" (*Harnischfeger,* 325 U. S. at 430–431). For common intelligence tells us that a practical business man would not actually and persistently pay for 48 hours of work if he is getting an average of only 40 hours, or less, of work from his employees, and rarely, if ever, gets 48 hours or more from any employee.[11] The only conceivable reason for an employer's willingness to agree (or to purport) to pay for 48 hours, in such circumstances, must be

[11] This is the fact in the instant case. See Pet. 6.

that, in reality, the amount he pays is what he feels he would have to pay, anyway, for the lesser number of hours (what, in fact, he does regularly and normally pay for the lesser number of hours). If the employer can, within the legal requirements, set his agreed hourly rate low enough so that the total weekly guarantee would not have to be greater than the weekly wage he would have to pay anyway for the lesser number of hours, he has nothing to lose and a great deal to gain at any time he happens to require an abnormal amount of overtime work.

To illustrate, an employer who would ordinarily pay a regular straight time rate of $2 an hour, and who expects that his employees will rarely work much more than 42 hours a week, will be willing to guarantee a weekly wage equivalent to the pay an employee would earn for 42 hours—$80 for 40 hours straight time ($2 per hour×40) plus $6 for 2 hours of overtime ($3 per hour×2), a total of $86. By guaranteeing $86 for a maximum workweek of *48* hours, and specifying the much lower basic rate of $1.62, instead of $2, the employer can avoid entirely *any* increased cost whenever he finds occasion for work in excess of 42 hours up to 6 hours weekly per employee; *i. e.,* he pays *nothing* for these 6 hours of overtime, not even straight-time pay, instead of the $3 per hour he would have to pay at his actual $2 per hour regular rate. Furthermore, he greatly reduces the cost of any overtime in excess of 48 hours whenever he finds an occasion to require that much overtime, for then he pays on the basis of the lower $1.65 basic rate rather than on the real $2 regular rate;

i. e., he pays $2.48 instead of $3 per hour for such additional overtime. The contract has a built-in device for avoiding any additional cost for 6 hours of overtime per week per employee at anytime in the future that the employer may decide to utilize it; in addition, this device enables the employer to decrease his overtime costs for an unlimited number of hours.[12]

This is plainly what the employer in the instant case has done, and this, we submit, is what Section 7 (d) (2) was designed to prevent. The particular administrative criterion, which the First and Second Circuits have rejected, and which respondent characterizes as a meaningless "rule of thumb"—the criterion that a stipulated rate is not a true "regular rate" if set at a figure so unrelated to the employee's actual working hours that his earnings only on rare occasions exceed the guarantee—is a practical adaptation of the requirements of this subsection to Section 7 (e) agreements. For if the employee's earnings

[12] It might be asked why the employee would agree to the prospect of working that much overtime without pay, if he did not feel he was, in fact, being paid for that number of hours. The answer is that, as a practical matter, an employee, when first presented with such a plan, considers what his actual hours of work have been over a period of time, and feels secure in the knowledge that he is not going to be called upon actually to work more than 42 hours in the normal course of his employment, and that the rare occasions when he may work more will be offset by the weeks when he works less than 40 hours—that, therefore, he is not losing anything by accepting such a plan. What the individual employee does not see—and this is a factor of prime importance to the basic overtime policy of the Act—is that, should business conditions change or should the employer decide to cut the number of his employees, the employee in all probability would be called upon *frequently*, instead of only on rare occasions, to work the 48 hours or more.

cannot exceed the weekly guarantee with a reasonable degree of frequency, and his actual average workweek does not even approximate his guaranteed hours, the guaranteed hours must have been set at a figure so high that he will certainly be receiving payments for regular or frequent periods "when no work is performed," and to an extent plainly unjustified by the objective of Section 7 (e) to permit the balancing of short and long workweek fluctuations in order to secure a stable weekly wage (see *infra*, pp. 24–27). If the employee rarely or never exceeds the guaranteed number of hours and his actual average weekly hours do not reasonably approach the guaranteed hours, payments purportedly for "periods when no work is performed" will not be "occasional" within the meaning of Section 7 (d) (2). In these circumstances, the stipulated "regular rate" does not include "all remuneration for [his] employment" within the requirements of Section 7 (d). And Congress, by incorporating the "bona fide" and "regular rate" requirements in Section 7 (e), evidently recognized that the exclusion of such regularly paid remuneration is unnecessary to the attainment of the objective of Section 7 (e).

2. By a process of reasoning similar to that of the First Circuit below, the Second Circuit's *Hartford* decision alluded to Section 7 (f) (3) to draw the inference that the precise limitation in that section negatived any intent to include any "similar" limitations in Section 7 (e). But, like the decision in the instant case, it failed to note the more pertinent provisions of Section 7 (d) relating to "regular rate,"

which would support precisely the opposite inference from Section 7 (f) (3).

In contrast to the "regular rate" language of Section 7 (e), Section 7 (f) (3) (see App. B, *infra*, p. 50) permits the employer and employee to agree, under specified conditions, upon a "basic rate." Significantly, this is the only place in the Act where the term "basic rate" appears, the term "regular rate" being used everywhere else to designate the rate on which overtime compensation is to be computed. This fact shows that Congress was making a deliberate distinction between agreements for a "basic rate" and agreements for a "regular rate." In Section 7 (f) (3), it specified the conditions which must be met by agreements upon a "basic rate," and also included the safeguard that such agreements could be made only pursuant to administrative regulation. It follows, therefore, that Section 7 (e), which expressly requires stipulation of a "regular rate," cannot be used by an employer who wishes to establish a "basic rate" which is not a "regular rate."[13] But plainly it does *not* follow, as the Second Circuit reasons in the *Hartford* case, that Section 7 (e) is self-sufficient and that "limitations not expressly stated [within that subsection itself], were not intended" (*Hartford*, App. A, *infra*, p. 36).

It does not follow, as the Second Circuit further inferred, that any limitation "similar" to those ex-

[13] Respondent's contracts in this case, in terms, specify a "basic rate of pay" (R. 14). Respondent, however, does not purport to have proceeded under Section 7 (f) (3), but is relying upon Section 7 (e).

pressly prescribed for the computation of a "basic rate" could not have been intended to limit agreements for a "regular rate" under Section 7 (e). For it is evident that both of these subsections, like most of the other amendments to Section 7, were directed to the same objective, *i. e.*, allowing some flexibility in computing the rate on which overtime compensation must be paid, subject however to specific limitations designed to keep such agreements reasonably consistent with the basic statutory overtime policy. The conditions applicable to determining "regular rate" were prescribed in Section 7 (d), so that there was no occasion for Congress to include expressly within Section 7 (e) itself the specific limitations on "regular rate." There is certainly no reason to infer that Congress intended to omit from its comprehensive definition of "regular rate" all limitations that might be "similar" to those expressed in the subsection on "basic rate." On the contrary, the most reasonable construction of both subsections is that the limitations on "basic rate" were intended to make the agreed "basic rate" substantially equivalent to a "regular rate" as defined in Section 7 (d). Thus, the inconsistency which the *Hartford* decision sees in applying to Section 7 (e) agreements a criterion "similar" to the limitations expressed in Section 7 (f) (3) rests on a misapprehension of the purpose of that particular limitation. The detailed specification, in Section 7 (d), of what should be included and what should be excluded in determining "regular rate" demonstrates that Congress did not intend that agreements

under Section 7 (e) should be free of similar limitations designed to preserve the basic overtime policy.

IV

The First and Second Circuit decisions would undermine the basic statutory overtime policy to a degree plainly unnecessary for the attainment of the "countervailing" objectives for which Section 7 (e) was designed.

Contrary to the assumption of these decisions, the administrative criterion (*supra,* p. 20; *infra,* p. 26) is not "a rigid application of the 'regular rate' requirement" which would "make impossible the attainment" of "the security of a regular weekly income" [14]—it is *not* the method of computation which

[14] Because *Belo*-type (Section 7 (e)) agreements are sometimes loosely referred to as "guaranteed wage contracts" (*Hartford, infra,* App. A, pp. 30, 32, 34), they are often confused with the *guaranteed annual* wage agreements which assure employees a quite different and far more effective guaranty of stability of income. (Compare Section 7 (b) (2), which, under carefully defined conditions, excepts from the statutory overtime requirements certain collective bargaining agreements designed to provide something of the stability of a guaranteed annual wage.) Unlike the guaranteed wage of a collective bargaining agreement which binds both employer and employee for a definite period of time of substantial duration, the *Belo* or *Brandtjen*-type agreement is a "contract" or "guarantee" in only a very limited and tenuous sense, revocable and subject to change at any time. The Brandtjen & Kluge "contract," for example, is little more than a form letter offering to pay the weekly guarantee for any week the employee commences work when the offer has not yet been retracted. The employee, however, is given no contract for any definite period, nor any assurance that the employer may not change the terms of the "guarantee" offered under the agreement. Indeed, the so-called "contracts" between Brandtjen & Kluge and its employees expressly provide that the weekly guarantee is subject to adjust-

the *Belo* decision described as "inflexible" (*viz*, that the "regular rate," where hours fluctuate from week to week, must be a variable one computed by dividing the weekly wage by the actual number of hours worked *each* week). Apparently, the courts assume that *unrestricted* flexibility is necessary to attain the objective of a stable weekly income and that therefore Congress must have intended unrestricted flexibility. But the employer and employee need not be granted freedom to select capriciously a figure unrelated to the usual fluctuations required by the nature of the work, in order to agree upon a stable weekly wage, and Congress in Section 7 (d) recognized this. Therefore, while allowing enough flexibility to enable agreements for a stable income, it imposed limitations designed to prevent abuse of this flexibility for purposes other than the attainment of the legitimate objective,

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ments for a variety of reasons, including the very broad one for "any other conditions not within the control of the company," which could, of course, simply mean as and if the employer's business conditions change. And the *Hartford* "contracts" expressly provide that the agreement is terminable by giving two weeks notice.

This distinction between a guaranteed annual wage contract and the Section 7 (e) agreement is of prime importance, because it emphasizes the limited nature of the wage stability which Congress sought to obtain by the enactment of Section 7 (e). While Congress, in enacting Section 7 (e), concluded that this much stability was a meritorious objective, the limited nature of the stability available through such an agreement is plainly a significant factor in deciding the extent to which Congress felt it necessary and intended to sacrifice the basic statutory overtime policy.

The effect of the First and Second Circuit decisions is to extend even more flexibility for agreements under Section 7 (e) than Congress authorized for guaranteed annual wage collective bargaining agreements under Section 7 (b) (2).

i. e., for the purpose of avoiding payment of any "real overtime wages * * * thus negativing any possible effect such a payment might have had upon the spreading of employment" (cf. *Helmerich* decision, 323 U. S. at 40).

The criterion which the Department of Labor has applied, in accordance with the degree of flexibility and the limitations provided in Sections 7 (d) and (e), simply requires that the specified regular rate bear a reasonable relationship to the remuneration regularly paid for the employee's actual working hours. It "does not preclude a wage agreement whereby" the weekly guaranty is "related, *fairly, and not evasively,* partly to regular hours of work and partly to overtime" (cf. concurring opinion of Mr. Justice Frankfurter in *Harnischfeger,* 325 U. S. at 433, emphasis added). It is plainly neither impossible nor impracticable for an employer, on the basis of the fluctuations in the working hours required by the usual course of his business during a reasonable past period, to set the maximum guaranteed hours at a realistic figure instead of purporting to pay for many hours which his experience has shown will rarely, if ever, actually be required by the needs of the business.

An arrangement which has little, if any, relationship to the fluctuations in working hours required in the usual course of the employer's business contains the seeds for encouraging unnecessary abuse of Section 7 (e) agreements, and for spreading *un*employment rather than employment. For no effective "financial pressure" will be applied at the times it is

needed (times of recession) to discourage the employer from discharging some of his men and increasing the overtime of the rest of them.

The overtime policy of the Fair Labor Standards Act was intended to promote a continuous remedial or ameliorative effect on problems of unemployment. It is evident that a widespread use of *Brandtjen*-type (or *Hartford-Feinberg*-type) wage agreements will not only negate this remedial effect, but will actually operate to aggravate the problem of localized "chronic" excessive unemployment, which even exists today, and was certainly a problem in 1949 when Congress enacted the amendments to this Act (see *supra,* p. 12–13).[15] When jobs become scarce in one region, workers migrate to more prosperous regions. If the prosperous regions are replete with *Brandtjen*-type wage plans, employers who have instituted such plans will be reluctant to furnish new jobs to the migrants even if their business has increased. For respondent, and similarly situated employers, far from being deterred by the "financial pressure" of *extra* premium costs, can increase the hours of their existing staff with virtually no additional cost. Thus, the existence of *Brandtjen*-type wage plans may frustrate a most important condition on which "the only real remedy for regional or 'spot' unemployment,"

[15] Although no present national problem of unemployment exists, there are a few local regions which may have been suffering from what President Eisenhower calls "chronic unemployment" due to such factors as the migration of industry, and the development of automation. In order to prevent these minor problems from developing into a major one, the Administration and Congress have begun to take preventive action.

depends—*i. e.*, "a dynamic expanding national economy which will * * * provide attractive job opportunities outside the distressed areas * * *."[16]

CONCLUSION

For these reasons, and for those set forth in the petition, we respectfully submit that the petition should be granted.

J. LEE RANKIN,
Solicitor General.

STUART ROTHMAN,
Solicitor,
BESSIE MARGOLIN,
Assistant Solicitor,
IRVING J. ALTER,
Attorney,
Department of Labor.

SEPTEMBER 1956.

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[16] Report of the Subcommittee on Unemployment of the Joint Committee on the Economic Report, p. 1 (1950).

Appendix A

United States Court of Appeals for the Second Circuit

No. 168—October Term, 1955

(Argued January 18, 1956. Decided July 20, 1956)

Docket No. 23739

James P. Mitchell, Secretary of Labor, plaintiff-appellant

v.

The Hartford Steam Boiler Inspection and Insurance Company, defendant-appellee

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Before: Medina, Hincks and Waterman, *Circuit Judges.*

Appeal by the Secretary of Labor from a judgment of the United States District Court for the District of Connecticut, Smith, J., dismissing his complaint against the Hartford Steam Boiler and Insurance Co. Affirmed.

Stuart Rothman, Solicitor, Bessie Margolin, Assistant Solicitor, Harry A. Tuell, Attorney, U. S. Dept. of Labor, Washington, D. C., Thomas L. Thistle, Regional Attorney, *for plaintiff-appellant.*

Lucius F. Robinson, Jr., John M. Donahue, Hartford, Conn. (Robinson, Robinson & Cole, Hartford, Conn., of counsel), *for defendant-appellee.*

Cyril Coleman, C. Duane Blinn, Hartford, Conn., *attorneys for Aetna Life Insurance Company, amicus curiae.*

WATERMAN, *Circuit Judge:*

This action, involving the validity under § 7 (e) of the Fair Labor Standards Act, 29 U. S. C. (1952 ed.) § 207 (e), of guaranteed wage contracts of the so-called *Belo* type, was brought by the Secretary of Labor to enjoin the Hartford Steam Boiler Inspection and Insurance Co. (hereafter "Hartford") from violating the overtime provisions of the Fair Labor Standards Act, 29 U. S. C. § 201 *et seq.* The United States District Court for the District of Connecticut dismissed the Secretary's complaint on the ground that defendant's guaranteed wage contracts were not in violation of § 7 (e) of the Act, and the Secretary appeals.

Hartford is a Connecticut corporation engaged in the casualty insurance business, primarily the insuring of steam boilers, pressure vessels, and machinery. It employs approximately 600 inspectors, whose duty it is to determine the initial and continuing suitability of boilers, machinery, etc. for insurance. The duties of these inspectors necessitate irregular hours of work, typically fluctuating between 35 and 50 hours per week. Since 1950 Hartford has paid its inspectors under individual guaranteed wage contracts providing for an hourly rate of pay for the first 40 hours in each work week, time and one-half for each hour over 40, and a weekly guarantee of an amount equivalent to the amount payable if 60 hours were actually worked. Each inspector was notified by a form letter accompanying his contract that it was not contemplated that he would have to work more than 60 hours in any work week, and each employee was required to get company authorization before doing so. In actual practice, only one quarter of 1% of the work

weeks over a two-year period exceeded 60 hours. The District Court found that the hours worked "were expected to fluctuate but to be kept below 60 hours in all but the most exceptional cases."

The sole issue raised by this appeal is whether a guaranteed wage contract complies with § 7 (e) of the Act, 29 U. S. C. § 207 (e), even though the employees subject to that contract do not work a number of hours in excess of the guarantee period specified in the contract in a "substantial proportion" or "significant number" of work weeks.[1] The Secretary, relying primarily on the judicial interpretation of "regular rate" prior to 1949, when the Act was extensively revised and § 7 (e) added, contends that the phrase "regular rate of pay" in § 7 (e) impliedly incorporates the "substantial proportion" requirement; Hartford disagrees. To resolve the issue, we must refer to the words of the statute, its purpose and history, and the cases construing it.

The basic overtime pay requirement of the Act is contained in § 7 (a).[2] It expresses the employer's

[1] The Secretary does not question the bona fides of the contract, the irregularity of the hours worked by the inspectors, and the sufficiency or accuracy of the records kept by Hartford. Hartford, however, contends that its inspectors are exempt from the coverage of the Act as administrative employees under § 13 (a), 29 U. S. C. § 213 (a). The Secretary replies that that question cannot be raised here because no cross-appeal was taken. Because of the view we take as to the validity of Hartford's guaranteed wage contracts, it is unnecessary for us to decide either the merits of this question or whether the issue can properly be raised by Hartford without a cross-appeal.

[2] "SEC. 7(a). Except as otherwise provided in this section, no employer shall employ any of his employees * * * for a workweek longer than forty hours, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed." 29 U. S. C. (1952 ed.) § 207 (a).

obligation in terms of a duty to pay for overtime not less than one and one-half times "the regular rate at which he is employed." The term "regular rate" was not defined in the original Act, nor was any reference made to guaranteed wage contracts. This absence of precise statutory criteria necessarily left to the courts the problem of giving content to the statutory language and of defining the limits within which employers and employees might establish basic and overtime rates by contract. The Department of Labor, which has consistently opposed guaranteed wage plans, initially took the position that any wage plan which did not reflect the actual hours worked in each workweek was invalid. However, this position was rejected by the Supreme Court in *Walling* v. *A. H. Belo Corporation,* 1942, 316 U. S. 624, and guaranteed wage contracts of the type now sanctioned by § 7 (e) were held valid. *Walling* v. *Belo Corporation, supra; Walling* v. *Halliburton Oil Well Cementing Co.,* 1947, 331 U. S. 17. Other Supreme Court cases, while accepting *Belo* as an exception to the usual rule, tended to narrow its application. *Walling* v. *Helmerich & Payne,* 1944, 323 U. S. 37; *Walling* v. *Youngerman-Reynolds Hardwood Co.,* 1945, 325 U. S. 419; *Walling* v. *Harnischfeger Corporation,* 1945, 325 U. S. 427; *149 Madison Ave. Corporation* v. *Asselta,* 1947, 331 U. S. 199; *Bay Ridge Operating Co.* v. *Aaron,* 1948, 334 U. S. 446. The Courts of Appeals, confronted by an exception of uncertain scope, evolved different criteria with the result that each case turned "pretty much on its particular facts." *McComb* v. *Roig,* 1 Cir. 1950, 181 F. 2d 726, 727; cf. *McComb* v. *Pacific & Atlantic Shippers Ass'n,* 7 Cir. 1949, 175 F. 2d 411; *McComb* v. *Utica Knitting Co.,* 2 Cir. 1947, 164 F. 2d 670.

It was against this background of uncertainty that Congress, as part of an extensive revision of the Act of 1949, enacted the present § 7 (e).[3] Section 7 (e) represents a codification of the previous case law only to the extent that it constitutes an express recognition of the validity of guaranteed wage contracts, limited in their use to employees who must work irregular hours and subject to the requirement that the contract be a "bona fide individual contract" or "an agreement made as a result of collective bargaining." The only express limitation on the contract guarantee of pay is that it be "for not more than sixty hours." There is no requirement expressed in the section that there be any sort of relation between that guarantee and the number of hours actually worked.

The Secretary, however, contends that the use of the term "regular rate" in § 7 (e) was meant to incorporate the pre-1949 judicial interpretation of that term, and that these pre-1949 cases establish that specified hourly rates are not "regular rates" unless they have actually received significant or substantial use in determining amounts to be paid to employees. Since the specified hourly rates are only operative when the employees work hours in excess of those guaranteed

[3] "SEC. 7 (e). No employer shall be deemed to have violated subsection (a) of this section by employing any employee for a workweek in excess of forty hours if such employee is employed pursuant to a bona fide individual contract, or pursuant to an agreement made as a result of collective bargaining by representatives of employees, if the duties of such employees necessitate irregular hours of work, and the contract or agreement (1) specifies a regular rate of pay of not less than the minimum hourly rate provided in section 6 (a) and compensation at not less than one and one-half times such rate for all hours worked in excess of forty in any workweek, and (2) provides for a weekly guaranty of pay for not more than sixty hours based on the rates so specified." 29 U. S. C. (1952 ed.) § 207 (e).

in the contract, this is an assertion that a guaranteed wage plan can only be valid if the employees who are subject to the contract work a number of hours in excess of the guarantee period in a "substantial proportion" or "significant number" of workweeks. For the reasons stated below, we think the Secretary's contention that Congress intended to impose a "significant number of workweeks" test on guaranteed wage plans, which in all other respects comply with § 7 (e), is an incorrect interpretation of the Act.

First, the pre-1949 decisions indicate that the law as to guaranteed wage contracts under § 7 (e) was unclear and unsettled. The two Supreme Court cases upholding the validity of guaranteed wage contracts, *Walling* v. *Belo Corporation, supra,* and *Walling* v. *Halliburton Co., supra,* give no indication that the Supreme Court had adopted the "significant number of workweeks" tests as a criterion of validity. In *Belo* the Court adverted to the fact that the employees, on occasion, exceeded the guarantee period and that in such weeks they received more than the guaranteed wage, but no weight was accorded that fact, and no attention was paid to the number of workweeks in which the guarantee was exceeded. In *Halliburton* the Court noted that the guarantee was exceeded "in about 20 per cent of the workweeks," but there is nothing to warrant a conclusion that the Court had established the requirement that there be a relationship between the number of hours for which pay is guaranteed and the number of hours customarily worked.

The decisions of lower federal courts illustrate the unsettled state of the law. Two Courts of Appeals adopted the "significant number of workweeks" test advocated by the Department of Labor. *McComb* v. *Sterling Ice & Cold Storage Co.,* 10 Cir. 1947, 165 F.

2d 265, *McComb* v. *Roig,* 1 Cir. 1950, 181 F. 2d 726; a third Court of Appeals upheld a guaranteed wage plan even though the employees involved never exceeded the hours guaranteed, *McComb* v. *Pacific & Atlantic Shippers Ass'n,* 7 Cir. 1949, 175 F. 2d 411; and this Court upheld the validity of a guaranteed wage plan without reference to the number of workweeks in which the hours worked had exceeded the guarantee, *McComb* v. *Utica Knitting Co.,* 2 Cir. 1947, 164 F. 2d 670.

Second, the purpose and history of the enactment of § 7 (e) in 1949 indicates congressional unwillingness to adopt the test advocated by the Secretary. When the Fair Labor Standards Act was originally enacted in 1938, the nation was in a period "of widespread unemployment and small profit." *Overnight Motor Transp. Co.* v. *Missel,* 1942, 316 U. S. 572, 578. The major purposes of the Act were to eliminate long hours and to spread work by increasing the cost of overtime to employers. With the improvement of the national economy, the Supreme Court upheld the validity of a guaranteed wage contract, indicating that it would not give the Act a rigid application which would make impossible the attainment by employers and employees of other objectives fully as meritorious as the spreading of employment, stating: "Many such employees value the security of a regular weekly income. They want to operate on a family budget, to make commitments for payments on homes and automobiles and insurance" and also: "When employer and employees have agreed upon an arrangement which has proven mutually satisfactory, we should not upset it and approve an inflexible and artificial interpretation of the Act which finds no support in its text and which as a practical matter eliminates the possibility of steady income to em-

ployees with irregular hours." *Walling* v. *Belo Corporation, supra,* at 635. The Department of Labor, strongly opposing this interpretation of the Act, attempted to obtain judicial[4] and then legislative reversal of the *Belo* doctrine. Many employer and employee groups, however, favored *Belo* and advocated legislative approval and expansion. During 1949, when revision of the Fair Labor Standards Act was being considered, these conflicting views were placed before Congress in the form of bills which would have: (1) expressly outlawed guaranteed wage contracts; (2) permitted their use, but subject to specific limitations including a "significant number of workweeks" test; or (3) permitted their use, without limitation as to the relation between hours worked and hours guaranteed. Congressional adoption of the third alternative in preference to the first or second alternatives which were advocated by the Department of Labor suggests that Congress favored *Belo* contracts and that it did not intend to limit their use in the manner suggested by the Secretary.

Other factors reinforce this conclusion. The inclusion of certain express limitations on the use of guaranteed wage contracts in § 7 (e) indicates that other limitations, not expressly stated, were not intended. And the precise statement in § 7 (f) (3) of a requirement similar to that contended for by the Secretary with respect to § 7 (e) supports a similar inference. Finally, the confusing state of the case law makes it unlikely that Congress intended to incorporate a "significant number of workweeks" requirement by the indirect method of including in § 7 (e) the phrase

[4] In *Walling* v. *Halliburton Oil Well Cementing Co.*, 1947, 331 U. S. 17, 25, the Administrator of the Wage and Hour Division, Department of Labor, contended that *Belo* had been wrongly decided. This contention was rejected by the Supreme Court.

"regular rate." Congress could hardly have found a less precise way to express such an intention.

Third, the judicial interpretation of § 7 (e) is contrary to the position advocated by the Secretary. In *Tobin* v. *Little Rock Packing Co.,* 8 Cir. 1953, 202 F. 2d 234, a guaranteed wage plan was upheld even though the employees *never* exceeded the guaranteed number of hours.[5] And recently the First Circuit has rejected the Secretary's argument in a persuasive and comprehensive opinion by Chief Judge Magruder. *Mitchell* v. *Brandtjen & Kluge, Incorporated,* 1 Cir. 1955, 228 F. 2d 291, aff'g D. Mass. 1955, 129 F. Supp. 675. We entirely agree with the reasoning and conclusion contained therein.

Judgment affirmed.

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[5] To the same effect is *Mitchell* v. *Adams,* M. D. Ga. 1955, 129 F. Supp. 377. The Secretary relies on the following cases as demonstrating judicial recognition under § 7 (e) of the "significant number of workweeks" test: *Sikes* v. *Williams Lumber Co.,* E. D. La. 1954, 123 F. Supp. 853; *Tobin* v. *Aronow,* D. Mont. 1951, 96 F. Supp. 279; *Tobin* v. *Morristown Poultry Co.,* E. D. Tenn. 1952, 21 CCH Labor Cases, Par. 66, 798; *Tobin* v. *Keystone Mfg. Co.,* W. D. Ark. 1952, 21 CCH Labor Cases, Par. 66, 911; *Tobin* v. *Wenatchee Air Service, Inc.,* E. D. Wash. 1952, 21 CCH Labor Cases, Par. 67,019; *Tobin* v. *Ewbank Motor Freight Lines, Inc.,* W. D. Tenn. 1952, 23 CCH Labor Cases, Par. 67,411. We think these cases are either erroneous or distinguishable on their facts.

United States Court of Appeals for the Second Circuit

No. 88—October Term, 1955

(Argued January 18, 1956. Decided July 31, 1956)

Docket No. 23464

JAMES P. MITCHELL, SECRETARY OF LABOR, PLAINTIFF-APPELLEE

v.

MEYER FEINBERG, DEFENDANT-APPELLANT

Before: MEDINA, HINCKS, and WATERMAN, *Circuit Judges.*

Appeal by defendant, Meyer Feinberg, from a judgment of the United States District Court for the Eastern District of New York, Galston, J., enjoining him from violating the overtime and record-keeping provisions of the Fair Labor Standards Act, 29 U. S. C. § 201 *et seq.* Decision below reported at 123 F. Supp. 899. Judgment modified.

Stuart Rothman, Solicitor, Bessie Margolin, Assistant Solicitor, Harry A. Tuell, Attorney, U. S. Dept. of Labor, Washington, D. C., John A. Hughes, Regional Attorney, *for plaintiff-appellee.*

Benjamin Cooper, New York City, *for defendant-appellant.*

PER CURIAM:

We think our decision in *Mitchell* v. *The Hartford Steam Boiler Inspection and Insurance Company,* filed July 20, 1956, requires a modification of the judgment

below. The facts are stated in Judge Gaiston's opinion below, 123 F. Supp. 899.

It is true that under the Feinberg contract, an employee may receive greater compensation, in terms of hourly rates, for weeks in which he works four days (or less) than in weeks in which he works five days. This incident, however, is not violative of the Act and constitutes, in our judgment, insufficient ground to differentiate the case from *Hartford*. We hold that there was error in the conclusions that the contract did not meet the requirements of the Fair Labor Standards Act, 29 U. S. C. A. § 201, and that the defendant had failed to pay required overtime for work in excess of 40 hours.

The violation of the record-keeping provisions of the Act, 29 U. S. C. A. §§ 211 (c) and 215 (a) (5), we think was fully proved and properly enjoined.

Modified.

WATERMAN, *Circuit Judge* (concurring in part and dissenting in part):

I concur in the per curiam opinion filed by my colleagues insofar as they affirm the decision below that the record-keeping provisions were violated. I dissent therefrom insofar as they hold that there was no violation of the overtime provisions, for I believe this case is so different on its facts from *Mitchell* v. *Hartford Steam Boiler Inspection and Insurance Co.* that the facts here require affirmance of the decision below. Although many of the contentions of the Secretary of Labor are disposed of adversely to him by our *Hartford* decision, it is my thought that the provision in appellant Feinberg's collective bargaining agreement by which appellant pays overtime compensation for non-overtime work clearly demonstrates that there was no compliance—and no intent to comply—with the requirement that a "regular rate" of pay be paid

for a workweek of forty hours or less; and therefore the agreement if entered into by an employer subject to the Act is violative of the Act,[1] and performance of it by the appellant, so subject, causes him to violate. See *149 Madison Ave. Corp. et al.* v. *Asselta et al.* (1947), 331 U. S. 199.

I read § 7 (e) of the Act, 29 U. S. C. (1952 ed.) § 207 (e) which became law in 1949 subsequent to Asselta, and which was discussed by us in *Mitchell* v. *Hartford Steam Boiler Inspection and Insurance Co., supra,* to state that employers who employ employees who work irregular hours during a workweek *in excess* of forty hours may provide a weekly guaranty of pay within the limitations therein contained provided the guaranty agreement specifies "a regular rate of pay" and "compensation at not less than one and one-half times such rate for all hours worked in excess of forty in any workweek."[2]

[1] Feinberg stipulated that his employees were within the coverage of the Fair Labor Standards Act. No question has been raised concerning the possible application to this case of the exception contained in § 13 (b) (1) of the Act, 29 U. S. C. § 213 (b) (1), which provides that "any employee with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to the provisions of section 204 of the Motor Carrier Act," 49 U. S. C. § 304, shall not be subject to the overtime provisions of the Fair Labor Standards Act. See *Morris* v. *McComb*, 1947, 332 U. S. 422.

[2] The pertinent statutory provisions are 7 (a) and 7 (e) of the Fair Labor Standards Act as amended. They read as follows:

"SEC. 7 (a). Except as otherwise provided in this section, no employer shall employ any of his employees * * * for a workweek longer than forty hours, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed." 29 U. S. C. (1952 ed.) § 207 (a).

"SEC. 7 (e). No employer shall be deemed to have violated subsection (a) of this section by employing any employee for a work-

I believe the facts in this case do not permit Feinberg to find shelter under § 7 (e).

Feinberg is the owner and operator of a small trucking business, and all of his employees, approximately 20 in number, are drivers or helpers who pick up and deliver cut goods and completed garments among manufacturers and contractors in the garment industry. These employees are paid pursuant to a guaranteed wage plan embodied in a collective bargaining agreement entered into by a local of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, of which the employees are members, and an employers' association, of which Feinberg is a member. This collective bargaining agreement specifies a regular basic hourly rate for the first 40 hours in each week, and guarantees payment each week, subject to conditions described below, for at least 8 hours of overtime at a rate equal to one and one-half times the regular hourly rate.[3] The guaranty is expressly qualified by the following provision:

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week in excess of forty hours if such employee is employed pursuant to a bona fide individual contract, or pursuant to an agreement made as a result of collective bargaining by representatives of employees, if the duties of such employee necessitate irregular hours of work, and the contract or agreement (1) specifies a regular rate of pay of not less than the minimum hourly rate provided in section 6 (a) and compensation at not less than one and one-half times such rate for all hours worked in excess of forty in any workweek, and (2) provides for a weekly guaranty of pay for not more than sixty hours based on the rates so specified." 29 U. S. C. (1952 ed.) § 207 (e).

[3] For instance, the schedule of wages provides:

Chauffeurs' guaranteed wage 48-hour week	*Chauffeurs' guaranteed wage and hourly rate— 48-hour week*
$91.00	$1.75
92.00	1.77
93.00	1.79

> No wages shall accrue or be paid to an employee during those weeks in which he is not required to report for work, and wages as provided for in the attached schedule, shall be reduced in proportion to days absent during those weeks where the employee fails to report for any reason other than lack of work, provided that said employee had, in fact, commenced work during that week, or had been called upon to render services during any day of the workweek, which workweek shall commence on Monday.

The agreement also provides that

> Temporary or part-time workers shall not be covered under this subdivision; the practice and the provisions in force shall continue.

The district court below found that prior to August 1953, Feinberg's employees worked variable hours from week to week, but never as many as 48. Up to that time the employees kept their own time cards, recording the actual hours worked. Then, beginning in August 1953, Feinberg personally kept the time cards, uniformly recording 48 hours for each employee each week, irrespective of the actual hours worked. The court concluded that Feinberg's employees never worked in excess of 48 hours a week and that his records did not accurately indicate the actual hours worked subsequent to August, 1953.

The district court, in holding that this wage agreement did not qualify under § 7 (e), 29 U. S. C. § 207 (e), for exception from the basic overtime provision of the Act, § 7 (a), 29 U. S. C. § 207 (a), relied on the following facts: (1) the hours worked by the employees never exceeded the 48 hour guaranty period; (2) employees who testified did not understand the method by which they were paid; (3) Feinberg's records did not accurately reflect the number of hours

his employees actually worked; and (4) where an employee missed a day for personal reasons, his pay for the week was decreased by one-fifth of the guaranteed wages for a forty-eight hour week. Insofar as the trial judge may have adopted the so-called "significant number of workweeks" test advocated by the Secretary to reach his result, he applied an erroneous criterion. *Mitchell* v. *Hartford Steam Boiler Inspection and Insurance Co., supra.* See also *Mitchell* v. *Brandtjen & Kluge, Inc.,* 1 Cir. 1955, 228 F. 2d 291. However, the opinion of the district judge, 123 F. Supp. 899, indicates that he was not relying on such a narrow proposition, but on the belief that the cumulative impact of all of the above factors demonstrated that the contractually specified hourly rates were wholly fictitious, had no significance in actuality, and were therefore not "regular rates" within the meaning of § 7 (a) and (e).[4]

I think that most of the factors relied on by the district judge are of minor significance. The validity of a guaranteed wage plan does not depend upon the fact that the employees have or have not worked hours in excess of those guaranteed in the contract or agreement, *Mitchell* v. *Hartford Steam Boiler Inspection and Insurance Co., supra.* Similarly, the inadequacy of the records may well constitute a violation of the record-keeping provisions of the Act, 29 U. S. C. §§ 211

[4] A footnote in *Mitchell* v. *Brandtjen & Kluge, Inc.*, 1 Cir. 1955, 228 F. 2d 291, 296, note 1, suggests the same position: "The argument would be that when § 7 (e) requires that a bona fide contract of employment must specify, among other things, 'a regular rate of pay of not less than the minimum hourly rate provided in section 6 (a),' it is not enough that the contract of employment may name an hourly rate and label it the 'regular rate of pay,' where it is obvious that such hourly rate is merely an arbitrary and fictitious figure not really meant by the parties to be the basis upon which the agreed compensation is to be calculated."

(c) and 215 (a) (5), but that alone should not invalidate a proper guaranteed wage plan when other evidence clearly shows that the employees' duties necessitate irregular hours and that the employees have never exceeded the hours for which the employer has guaranteed to pay. Also the fact that several employees failed to completely understand the computation by which they are paid does not make the established practice "unreal" or "fictitious." If the employees were working under individual contracts, their failure to fully understand the terms of employment might raise serious doubts concerning the bona fides of the contract, but they were working here under a collective bargaining agreement negotiated with the International Brotherhood of Teamsters, Chauffeurs, and Helpers, one of the most powerful unions in the country. Despite this, I think that this particular collective bargaining agreement violates the provisions of the Act by requiring that the employer reduce the weekly guaranteed wage "in proportion to days absent during those weeks where the employee fails to report for any reason other than lack of work * * *." Under this provision of the collective bargaining agreement, Feinberg decreased the pay of employees who missed days of work for personal reasons by one-fifth of the "guaranteed" weekly wage for each day missed. So in such workweeks, the employer was neither paying the guaranteed wage provided for in the agreement nor determining compensation for work hours not in excess of 40 hours by the application of the hourly "regular rate" specified in the agreement. He was crediting employees with daily overtime in such workweeks. I contend that the Act requires the employer, if he is subject to its provisions, to pay the guaranteed sum in compliance with § 7 (e), or, if, for a justifiable reason, he does

not do so, to pay his employees in accordance with the "regular rate" specified in the agreement as required by § 7 (a) and reiterated in § 7 (e). I reach this conclusion reluctantly because of the obvious benefits to employees of such a practice as the daily crediting of overtime. But the judicial interpretation of the Act prior to the 1949 amendment clearly proscribed such arrangements, *149 Madison Ave. Corp.* v. *Asselta*, 1947, 331 U. S. 199, 204–206, and I am unable to find any congressional determination to overrule such interpretation by the enactment of § 7 (e). True, a guaranteed wage contract escapes the actual application of the specified "regular rate" by applying that rate and the overtime rate to an assumed, rather than actual, number of weekly work hours. But the overtime rate is still applied whenever the hours actually worked exceed the guaranteed hours. *Walling* v. *Halliburton Oil Well Cementing Co.*, 331 U. S. 17, 21. Conversely, when the hours of work are less than forty, *and*, because of the provisions of the particular contract or agreement, the employer is not obligated to pay and does not pay the full guaranty, I think he is required to determine the pay of his employees by application to the actual hours worked of the "regular rate" specified in the contract or agreement.

Therefore I think the district court properly enjoined Feinberg from violating both the overtime and the record-keeping provisions of the Act, and I would affirm the judgment below in all respects.

APPENDIX B

STATUTORY PROVISIONS

Fair Labor Standards Act of 1938, as amended (c. 676, 52 Stat. 1060; c. 736, 63 Stat. 910, 29 U. S. C. 201):

SEC. 7* [63 Stat. 913].

(a) Except as otherwise provided in this section, no employer shall employ any of his employees who is engaged in commerce or in the production of goods for commerce for a workweek longer than forty hours, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

(b) No employer shall be deemed to have violated subsection (a) by employing any employee for a workweek in excess of that specified in such subsection without paying the compensation for overtime employment prescribed therein if such employee is so employed—

*(1) in pursuance of an agreement, made as a result of collective bargaining by representatives of employees certified as bona fide by the National Labor Relations Board, which provides that no employee shall be employed more than one thousand and forty hours during any period of twenty-six consecutive weeks, or

*(2) in pursuance of an agreement, made as a result of collective bargaining by representatives of employees certified as bona fide by the National Labor Relations Board, which provides that during a specified period of fifty-two

* Single asterisk (*) indicates amended provisions; double asterisk (**) indicates new provisions (as amended in 1949).

consecutive weeks the employee shall be employed not more than two thousand two hundred and forty hours and shall be guaranteed not less than one thousand eight hundred and forty hours (or not less than forty-six weeks at the normal number of hours worked per week, but not less than thirty hours per week) and not more than two thousand and eighty hours of employment for which he shall receive compensation for all hours guaranteed or worked at rates not less than those applicable under the agreement to the work performed and for all hours in excess of the guaranty which are also in excess of forty hours in the workweek or two thousand and eighty in such period at rates not less than one and one-half times the regular rate at which he is employed; or

(3) for a period or periods of not more than fourteen workweeks in the aggregate in any calendar year in an industry found by the Secretary of Labor to be of a seasonal nature,

and if such employee receives compensation for employment in excess of twelve hours in any workday, or for employment in excess of fifty-six hours in any workweek, as the case may be, at a rate not less than one and one-half times the regular rate at which he is employed.

* * * * *

**(d) As used in this section the 'regular rate' at which an employee is employed shall be deemed to include all remuneration for employment paid to, or on behalf of, the employee, but shall not be deemed to include—

**(1) sums paid as gifts; payments in the nature of gifts made at Christmas time or on other special occasions, as a reward for service, the amounts of which are not measured by or dependent on hours worked, production or efficiency;

**(2) payments made for occasional periods when no work is performed due to vacation,

holiday, illness, failure of the employer to provide sufficient work, or other similar cause; reasonable payments for traveling expenses, or other expenses, incurred by an employee in the furtherance of his employer's interests and properly reimbursable by the employer; and other similar payments to an employee which are not made as compensation for his hours of employment;

**(3) sums paid in recognition of services performed during a given period if either, (a) both the fact that payment is to be made and the amount of the payment are determined at the sole discretion of the employer at or near the end of the period and not pursuant to any prior contract, agreement, or promise causing the employee to expect such payments regularly; or (b) the payments are made pursuant to a bona fide profit-sharing plan or trust or bona fide thrift or savings plan, meeting the requirements of the Secretary of Labor set forth in appropriate regulation which he shall issue, having due regard among other relevant factors, to the extent to which the amounts paid to the employee are determined without regard to hours of work, production, or efficiency; or (c) the payments are talent fees (as such talent fees are defined and delimited by regulations of the Secretary) paid to performers, including announcers, on radio and television programs;

**(4) contributions irrevocably made by an employer to a trustee or third person pursuant to a bona fide plan, for providing old-age, retirement, life, accident, or health insurance or similar benefits for employees;

**(5) extra compensation provided by a premium rate paid for certain hours worked by the employee in any day or workweek because such hours are hours worked in excess of eight in a day or forty in a workweek or in excess of the employee's normal working hours or regular working hours, as the case may be;

*(6) extra compensation provided by a premium rate paid for work by the employee on Saturdays, Sundays, holidays, or regular days of rest, or on the sixth and seventh day of the workweek, where such premium rate is not less than one and one-half times the rate established in good faith for like work performed in nonovertime hours on other days; or

*(7) extra compensation provided by a premium rate paid to the employee, in pursuance of an applicable employment contract or collective bargaining agreement, for work outside of the hours established in good faith by the contract or agreement as the basic, normal, or regular workday (not exceeding eight hours) or workweek (not exceeding forty hours), where such premium rate is not less than one and one-half times the rate established in good faith by the contract or agreement for like work performed during such workday or workweek.

**(e) No employer shall be deemed to have violated subsection (a) by employing any employee for a workweek in excess of forty hours if such employee is employed pursuant to a bona fide individual contract, or pursuant to an agreement made as a result of collective bargaining by representatives of employees, if the duties of such employee necessitate irregular hours of work, and the contract or agreement (1) specifies a regular rate of pay of not less than the minimum hourly rate provided in section 6 (a) and compensation at not less than one and one-half times such rate for all hours worked in excess of forty in any workweek, and (2) provides a weekly guaranty of pay for not more than sixty hours based on the rates so specified.

**(f) No employer shall be deemed to have violated subsection (a) by employing any employee for a workweek in excess of forty hours if, pursuant to an agreement or under-

standing arrived at between the employer and the employee before performance of the work, the amount paid to the employee for the number of hours worked by him in such workweek in excess of forty hours—

(1) in the case of an employee employed at piece rates, is computed at piece rates not less than one and one-half times the bona fide piece rates applicable to the same work when performed during non-overtime hours; or

(2) in the case of an employee performing two or more kinds of work for which different hourly or piece rates have been established, is computed at rates not less than one and one-half times such bona fide rates applicable to the same work when performed during non-overtime hours; or

(3) is computed at a rate not less than one and one-half times the rate established by such agreement or understanding as the basic rate to be used in computing overtime compensation thereunder: *Provided,* That the rate so established shall be authorized by regulation by the Secretary of Labor as being substantially equivalent to the average hourly earnings of the employee, exclusive of overtime premiums, in the particular work over a representative period of time; and if (i) the employee's average hourly earnings for the workweek exclusive of payments described in paragraphs (1) through (7) of subsection (d) are not less than the minimum hourly rate required by applicable law, and (ii) extra overtime compensation is properly computed and paid on other forms of additional pay required to be included in computing the regular rate.

*(g) Extra compensation paid as described in paragraphs (5), (6), and (7) of subsection (d) shall be creditable toward overtime compensation payable pursuant to this section.

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